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No. 86-411

In The

Supreme Court of the United States

October Term, 1986

GEORGE J. OTLOWSKI, Mayor of Perth Amboy; PAUL ZITO, ARMAND R. CANNAMELA and ANGEL QUINONES, individually and as members of the City Council; JAMES GOUMAS, Tax Assessor of the City of Perth Amboy, and C. MARION LIPIRA, Tax Collector of the City of Perth Amboy,

Petitioners,

vs.

THOMAS H. KEAN, Governor of the State of New Jersey; MICHAEL M. HORN, Treasurer of the State of New Jersey; JOHN R. BALDWIN, Director of the Division of Taxation of the State of New Jersey and the DIVISION OF TAXATION OF THE STATE OF NEW JERSEY: IRWIN I. KIMMELMAN, Attorney General of the State of New Jersey; CARMEN A. ORECHIO, President of the New Jersey Senate; and the NEW JERSEY SENATE: ALAN J. KARCHER, Speaker of the General Assembly of the State of New Jersey; and the GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY; THE MIDDLESEX COUNTY BOARD OF TAXATION, a body politic of the State of New Jersey; BARBARA GALLAGHER, President of the Middlesex County Board of Taxation; FRANKLIN F. MURPHY, Member of the Middlesex County Board of Taxation; ANGELA J. SZYMANSKI, County Tax Administrator of the Middlesex County Board of Taxation; all in their official and individual capacities,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for Respondents, Thomas H. Kean, et al.
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-1527

JAMES J. CIANCIA
Assistant Attorney General
Of Counsel

HARRY HAUSHALTER
Deputy Attorney General
On the Brief and
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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COUNTERSTATEMENT OF THE CASE

Petitioners, the City of Perth Amboy ("Perth Amboy") in the State of New Jersey and certain of its public officials, are seeking, by writ of *certiorari,* to have this Court review a decision by the New Jersey Superior Court, Appellate Division, which the Supreme Court of New Jersey refused to review. The New Jersey Appellate Division affirmed a trial court judgment requiring Perth Amboy to implement a municipal-wide revaluation of its real property under the Local Property Tax Law, *N.J.S.A.* 54:4-1 *et seq.* Perth Amboy has never questioned the need for a revaluation in said municipality but has challenged the validity of the entire local property tax system in the State of New Jersey under the Equal Protection and Due Process Clauses as a means of avoiding the implementation of the revaluation program. Petitioners thus maintain that municipal boundaries, by being coextensive with taxing districts for purposes of raising property taxes for county and municipal governments and for school districts, are arbitrarily established and create unequal revenue raising districts. Neither the trial court nor the Appellate Division addressed this challenge in any detail primarily because the petitioners raised this issue in a collateral proceeding and in an untimely fashion as a means of avoiding the implementation of a necessary revaluation program.

The respondents are Thomas H. Kean, Governor of New Jersey, and various other New Jersey officials and agencies, including the Middlesex County Board of Taxation ("County Board"). The County Board issued an order on October 1, 1984 directing the City of Perth Amboy and its officials to commence a real property revaluation

to be effective for the 1986 tax year. Under New Jersey's local property tax system, the revaluation order required the approval of the Director, Division of Taxation, who approved the order on October 22, 1984. Following the issuance and approval of the revaluation order, Perth Amboy had the right to challenge the validity of the order by filing a complaint with the Tax Court of New Jersey within 45 days. Perth Amboy, however, failed to appeal the validity of the order at any time and has to date failed to comply with the revaluation order since its issuance.

The County Board filed a complaint, in the nature of *mandamus*, with the New Jersey Superior Court, Law Division, on February 19, 1985, naming the City of Perth Amboy and its responsible officials as defendants and seeking court enforcement of the revaluation order. The defendants filed an answer to the complaint, a counterclaim and a third party complaint challenging the entire local property taxing scheme on federal equal protection and due process grounds and additional state constitutional grounds. As part of their legal challenge, the petitioners maintained that they required detailed discovery from the respondents in order to accumulate the necessary data to substantiate their contentions.

The matter came before the trial court on a motion for summary judgment filed by the County Board. In an oral opinion rendered on June 7, 1985, the trial court held that the County Board properly issued the revaluation order in accordance with applicable constitutional and statutory standards, that such order was entitled to judicial enforcement and that defendants were raising challenges to the property tax system which were untimely and which involved matters of policy for the New Jersey Legis-

lature to resolve (App. 4A). The court's determination was reflected in a final order entered on June 7, 1985. The petitioners filed a notice of appeal with the Appellate Division from the whole of the trial court's judgment. The Appellate Division, in an opinion dated April 7, 1986, affirmed the trial court substantially for the reasons expressed in its oral opinion (App. 1A). Petitioners filed a notice of petition for certification with the Supreme Court of New Jersey seeking a review of the whole of the judgment entered by the Appellate Division. In an order dated June 27, 1986, the Supreme Court of New Jersey denied certification (App. 3A).

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ARGUMENT

SINCE THE FEDERAL EQUAL PROTECTION AND DUE PROCESS ISSUES CHALLENGING THE ENTIRE NEW JERSEY LOCAL PROPERTY TAX SYSTEM WERE TIME BARRED AS A MATTER OF STATE LAW, THE PETITION FOR CERTIORARI DOES NOT PRESENT A PROPER FEDERAL CONSTITUTIONAL ISSUE AND SHOULD BE DENIED.

The county boards of taxation,* as agents of the New Jersey Legislature, have the responsibility of implementing the state constitutional directive concerning the taxation of real property:

> Property shall be assessed for taxation under general laws and by uniform rules. All real property

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* County boards of taxation are state agencies which exercise administrative authority on a county-wide basis regarding the local property tax system. *N.J.S.A.* 54:3-1 *et seq.* A separate county board of taxation sits in each of New Jersey's 21 counties. *N.J.S.A.* 54:3-2.

> assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value, except as otherwise permitted herein, and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district. [*N.J. Const.* (1947), Art. VIII, § I, par. 1(a)].

This constitutional standard requires that assessments under the Local Property Tax Law, *N.J.S.A.* 54:4-1 *et seq.*, must be based under general laws and uniform rules to secure fairness in the taxing scheme. *Switz v. Kingsley*, 37 *N.J.* 566, 572, 182 *A.*2d 841, 850 (1962). In accordance with this constitutional instruction, the New Jersey Legislature has charged that each county board *shall:*

> . . . secure the taxation of all property in the county at its taxable value as prescribed by law, in order that all property, except such as shall be exempt by law, shall bear its full and just share of taxes. [*N.J.S.A.* 54:3-13];
>
> . . . issue such directions as may be necessary to carry into effect the provisions of this title. [*N.J.S.A.* 54:3-14];
>
> . . . have supervision and control over all officers charged with the duty of making assessments for taxes in every taxing district in the county. Such officers shall be subject to, and shall, in making assessments, be governed by such rules, orders or directions as may be issued by the county board, in the enforcement of the objects of this title . . . [*N.J.S.A.* 54:3-16].

In addition, the Legislature has conferred upon the boards comprehensive authority to:

> . . . revise, correct and equalize the assessed value of all property in the respective taxing districts, increase or decrease the assessed value of any property

> not valued at its taxable value, assess property omitted from any assessment, as provided by law, at its taxable value, and in general do everything necessary for the taxation of all property in the county at its taxable value. [*N.J.S.A.* 54:4-47].

Since the first judicial directive requiring revaluations to correct inequities of assessment practices in *Switz v. Middletown Twp.*, 23 *N.J.* 580, 130 *A.*2d 15 (1957), the New Jersey judiciary has consistently sustained the authority of the county boards to direct municipalities to implement programs of revaluation. In *Switz*, where a property owner prevailed in an action in lieu of *mandamus* to compel reassessment against the municipality in which the property was located, and in *Ridgefield Park v. Bergen County Board of Taxation*, 31 *N.J.* 420, 157 *A.*2d 829 (1960), app. dism. 365 *U.S.* 648 (1961), where a municipality and several of its taxpayers were allowed to maintain a similar action against other municipalities within the county, county boards were joined as defendants. In neither case, however, did the New Jersey courts regard the county boards, which are essentially supervisory bodies with respect to the proper maintenance of assessment rolls, as the appropriate agencies to conduct municipal revaluations. That responsibility rested with the municipalities and their assessors:

> In *Switz* it was noted that basically the problem in many, if not most, of the municipalities was that the assessment rolls were out of hand and hence nothing short of municipal-wide revaluations would bring order out of chaos; that the county board had neither the time nor the funds for so massive an effort; and that accordingly a judgment directing it to perform the basic duties of the assessors would be unwarranted. We expressed our confidence that if the local

> assessors did their job, the county board would not fail in its assigned role. We have no reason to feel differently about the county board in the present case. [*Ridgefield Park v. Bergen County Board of Taxation, supra,* 31 *N.J.* at 432, 157 *A.*2d at 835].

Switz and *Ridgefield Park* were comparatively early cases in the continuing history of the efforts to secure assessments at full taxable value as prescribed by the New Jersey Constitution and statutes and to eliminate inequities caused by the failure of municipalities to do so voluntarily. The law is not self-executing and the county boards are frequently confronted with municipalities that are unwilling to implement revaluations. In these circumstances, a county board has no recourse, if it is to execute its constitutional and statutory mandate, but to order a lax municipality to revalue and, if the order is disregarded, to seek enforcement of the law by judicial compulsion. The New Jersey courts have sustained the authority of a county board to order a revaluation and, where necessary, to seek its enforcement by court action. *Essex County Board of Taxation v. Newark,* 73 *N.J.* 69, 372 *A.*2d 607 (1977).

The revaluation order issued by the Middlesex County Board of Taxation and directed at Perth Amboy was thus consistent with well-settled New Jersey law. It stems from a recognition that the direct responsibility for the maintenance of assessments at the prescribed level of full value rests with the municipal tax assessor. *N.J.S.A.* 54:4-23. It is when the municipal assessor is unable or unwilling to correct widespread deficiencies that the county board orders general revaluation, but then only in accordance with established guidelines and only upon approval by the Director of the Division of Taxation. The enforcement of

the revaluation order by judicial decree is the final step instituted to bring assessments into harmony with the New Jersey Constitution. It is certainly not an occasion appropriate for the municipality to seek still further delay in implementing the needed revaluation by raising issues well beyond the applicable statute of limitations.

A municipality's avenue of appeal from a board's order to revalue is clearly established:

> Certainly a municipality is entitled at some point to be heard as to whether the order of the Board seeking to compel revaluation is proper. Such an opportunity is available by direct appeal from the order of the particular county board of taxation to the Division of Tax Appeals. *N.J.S.A.* 54:2-35. In this case, as is set forth above, the taxing districts were given ample opportunity to present facts and arguments before the Division of Tax Appeals. That they chose to forego this opportunity cannot now afford them a basis for complaining that they have not been heard. . . . The appropriate forum for a full evidentiary hearing is the Division of Tax Appeals. [*Bergen County Board of Taxation v. Bogota*, 114 *N.J. Super* 140, 146, 275 *A*.2d 158, 161 (App. Div. 1971)].

The court in *Bogota, supra*, thus expressly recognized that the character of the action *sub judice* is to enforce the revaluation order by summary proceeding and not to permit an inquiry into the underlying validity of the revaluation order.

Since the *Bogota* decision, the Tax Court of New Jersey was created and assumed the jurisdiction formerly exercised by the Division of Tax Appeals as of July 1, 1979. See *N.J.S.A.* 2A:3A-1 *et seq.* Perth Amboy had ample opportunity to challenge the validity of the revaluation order by filing a complaint with the Tax Court 45

days from the date the Director of Taxation approved the revaluation order on October 22, 1984. *N.J.S.A.* 54:51A-1a; New Jersey Court Rule 8:4-1(a)(2). As the New Jersey courts properly held in this matter, Perth Amboy never filed such an appeal and thereby cannot be permitted in this proceeding and at this juncture to challenge the validity of the revaluation order and the entire local property tax assessing system.

It is well settled in New Jersey that statutes of limitation are particularly significant in the context of tax laws, which generically require that tax determinations are subject to review in strict conformity with statutory time limitations, borne of the exigencies of taxation and the administration of local government. Failure to file a timely appeal is thus a fatal jurisdictional defect. *F.M.C. Stores Co. v. Morris Plains,* 100 N.J. 418, 424, 425, 495 *A.*2d 1313, 1316, 1317 (1985).

The courts below in this matter never seriously considered petitioners' challenge to the local property taxing scheme because the issue was time-barred by the applicable 45-day statute of limitations. It has been consistently recognized by this Court that it will intervene in the state judicial process only to correct wrongs of a federal constitutional dimension and not to interfere with issues that are a matter of state constitutional or statutory law. *Smith v. Phillips,* 455 *U.S.* 209, 221 (1982). In evaluating issues concerning state law, a federal court must defer to the determinations by the state court. *Kolender v. Lawson,* 461 *U.S.* 352, 355 (1983). In this case, the petitioners' challenge to the New Jersey local property tax system was dismissed because it was not raised within the applicable

statute of limitations. Since statutes of limitation have been inherently recognized as matters of state law by this Court, *Guaranty Trust Co. v. York*, 326 *U.S.* 99, 110 (1945), it is evident that the Appellate Division determination in question related to an issue of state law not subject to review by this Court.

However, even if the merits of petitioners' contentions were to be deemed timely raised, they nevertheless involve issues previously considered and rejected by this Court. It is fundamental to federal constitutional principles, particularly under equal protection and due process analysis, that state legislatures have a wide range of discretion in establishing classifications and that such discretion is especially broad in the field of taxation:

> The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. . . . It has . . . been pointed out that *in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.* Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. . . . [*Madden v. Kentucky*, 309 *U.S.* 83, 87-88 (1940); emphasis supplied].

These principles were reaffirmed in *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 *U.S.* 356, 359 (1973):

> Where taxation is concerned and no specific federal right, apart from equal protection is imperiled,

the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. As stated in *Allied Stores of Ohio v. Bowers*, 358 *U.S.* 522, 526-527, 3 *L. Ed.* 2d 480, 79 *S. Ct.* 437:

> "The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation."

The rationale for this broad view of government's taxing powers has been explained as follows:

> [A tax] is . . . a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privilege of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. . . . Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good. . . . This court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him. [*Car-*

michael v. Southern Coal & Coke Co., 301 *U.S.* 495, 522-523 (1931)].

The complexity of attempting to determine the fairness of taxing schemes was further recognized in *San Antonio School District v. Rodriguez*, 411 *U.S.* 1 (1973), in which this Court considered challenges, on equal protection grounds, to Texas' statutory method for financing public education primarily from revenues collected from local real property taxes. In affirming this statutory financing scheme, this Court stated that,

> [W]e stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. Yet, we are urged to direct the States either to alter drastically the present system or to throw out the property tax altogether in favor of some form of taxation. No scheme of taxation, whether the tax is imposed on property, income or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause. [*Id.*, 411 *U.S.* at 41].

Clearly, therefore, this Court has explicitly established the broad discretion state legislatures may exercise in formulating taxing statutes and has further cautioned the judiciary against undue interference with a state's fiscal policies.

Petitioners are asking for extraordinary relief in this matter and are requesting this Court to analyze the entire local property tax structure in the State of New Jersey.

Since this matter was heard in the context of a motion for summary judgment, no factual record exists in this case which supports any of the factual allegations raised by the petitioners. Moreover, the delicate balancing of concerns and interests whenever fiscal issues are debated clearly involves a legislative activity. The legislative nature of this issue is even more pronounced in this case since the petitioners are seeking an overhaul of the entire local property tax system in New Jersey.

It is thus evident that the constitutional challenge to the New Jersey local property tax scheme raised by the petitioners is both untimely and ignores the broad deference afforded to state legislatures in formulating tax systems. The petition for the writ of *certiorari* plainly does not raise a question of constitutional dimension which warrants the granting of such extraordinary relief. Therefore, the petition should be denied.

———o———

CONCLUSION

For the aforementioned reasons, it is respectfully submitted that the petition for writ of *certiorari* should be denied.

Resepectfully submitted,

W. Cary Edwards
Attorney General of New Jersey
Attorney for Respondents,
Thomas H. Kean, et al.

By: Harry Haushalter
Deputy Attorney General
Member of the Bar of the
United States Supreme Court

Dated: October 31, 1986

James J. Ciancia
Assistant Attorney General
Of Counsel

Harry Haushalter
Deputy Attorney General
On the Brief and
Counsel of Record